AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT

Fox Studios FSA 74
38 Driver Avenue
Moore Park NSW 2021
Toll Free: 1800 251 996
Email: info@afact.com.au

The DBCDE Convergence Review Final Report

Relevant recommendations

1. From Review to practice - way the review will be rolled out and the staged approach that has been suggested
2. Opportunities for further comment and review - ALRC for IP issues, public comment on Govt response, legislative process
3. Threats - what is problematic for AFACT members
4. Next developments - what would be expected to happy and when

A. The Report Recommendations

Chapter 1: The need for a new approach

1. The policy framework for communications in the converged environment should take a technology neutral approach that can adapt to new services, platforms and technologies.
    a. Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.
    b. The focus of legislation should be on creating a sustainable structure within which a new independent communications regulator can apply, amend or remove regulatory measures as circumstances require.
2. There should be no licensing or any similar barrier to market entry for the supply of content or communications services, except where necessary to manage use of a finite resource such as radiocommunications spectrum.
3. Large enterprises that provide professional content services to a significant number of Australians should be expected to continue to:
    a. have proposed changes in ownership scrutinised
    b. meet community expectations about standards applicable to the content they provide
    c. contribute in appropriate ways to the availability of Australian content.
4. These enterprises (which would be called content service enterprises) should be identified by the following criteria:
    a. they have control of professional content they deliver
    b. they meet a threshold of a large number of Australian users of that professional content
    c. they meet a threshold of a high level of revenue derived from supplying that professional content to Australians.

    The thresholds for revenue and users would be set at a high level so that only the most substantial and influential entities are within the category of a content service enterprise.

5. The appropriate threshold levels of revenue and of users should be determined following a review of relevant media enterprises by the new communications regulator. The appropriate threshold levels should be reviewed periodically by the regulator.

Chapter 2: Media ownership

6. Media ownership and control rules should promote a diverse range of owners at a local and national level.
    a. Ownership of local media should continue to be regulated through a 'minimum number of owners' rule. The existing '4/5' rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a local market. The new communications regulator should be able to provide an exemption from the rule in exceptional circumstances, if it is satisfied that a transaction will provide a public benefit in a specific local market.
    b. The new communications regulator should have the ability to examine changes in control of content service enterprises of national significance. It should have the power to block a proposed transaction if it is satisfied—having regard to diversity considerations—that the proposal is not in the public interest.
7. The following rules should be removed and replaced by a 'minimum number of owners' rule and a public interest test:
    - the '75 per cent audience reach' rule
    - the '2 out of 3' rule
    - the 'two-to-a-market' rule
    - the 'one-to-a-market' rule.

Chapter 3: Content-related competition issues

8. The new communications regulator should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified.
9. The new communications regulator should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the Australian Competition and Consumer Commission to deal with anti-competitive market behaviour. These powers should only be exercised following a public inquiry.

Chapter 4: Content standards

10. There should be a technology-neutral and flexible approach to media content standards.
    a. The new communications regulator should be responsible for all compliance matters related to media content standards, except for news and commentary. This will include the responsibility for administering the new national classification scheme proposed by the recent Australian Law Reform Commission review. An independent classification board would be established as part of the organisational structure of the new regulator to undertake specific classification functions.
    b. An independent self-regulatory news standards body operating across all media should be established by industry to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.

i. Content service enterprises should be required to be members of the news standards body, which should be established and adequately funded and resourced by its industry members.

ii. As it is in the public interest that such a body be appropriately resourced, the government should make a financial contribution.

iii. News and commentary providers that are not content service enterprises should be encouraged to join the news standards body.

iv. The news standards body should have credible sanctions and the power to order members to prominently publish its findings.

v. The news standards body should be able to refer to the new communications regulator instances where there have been persistent or serious breaches of the media code. The new communications regulator should also be able to request the news standards body to conduct an investigation.

c. The new arrangements outlined at paragraph 10(b) should be implemented in stages and the co-regulatory broadcasting codes in relation to news standards should not be repealed until the communications regulator is satisfied that the new self-regulatory arrangements are working effectively.

d. Content service enterprises should also be subject to:

i. children's television content standards, where appropriate

ii. other content standards made by the new communications regulator where there is a case for regulatory intervention, with the starting point being the matters covered by the existing co-regulatory codes made under the Broadcasting Services Act 1992.

e. Content providers that are not of sufficient size and scope to be classified as a content service enterprise should be encouraged to opt in to content standards applying to content service enterprises, or to develop their own codes.

11. Where the new communications regulator is responsible for approving and enforcing content standards, it should have:

a. discretion to approve industry codes or adopt its own standards

b. discretion to determine the most effective and efficient complaints and investigation procedures

c. direct enforcement powers in response to a breach of codes or standards

d. a graduated range of effective remedies to ensure compliance.

12. The new communications regulator should also:

a. certify whether complaints systems, privacy controls and other measures in self-regulatory industry codes meet best practice standards

b. work with industry to provide transparent information to content users about what they can do to control access to content, building on government programs to educate consumers about media and digital literacy

c. set technical standards that assist content users in managing access to content (such as parental locks or age-verification systems).

Chapter 5: Australian content: screen

13. The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in recommendations 14 and 15.
14. Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund.
15. The government should create and partly fund a new converged content production fund to support the production of Australian content.
16. Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.
17. Interactive entertainment, such as games and other applications, should be supported by an offset scheme and the new converged content production fund.
18. The following transitional arrangements should apply for commercial free-to-air and subscription television broadcasters until they are included within the uniform content scheme:
    a. For commercial free-to-air television broadcasters:
        i. The existing 55 per cent transmission quota that is imposed on each broadcaster's primary channel should continue.
        ii. There should be a 50 per cent increase in Australian sub-quota content obligations for drama, documentary and children's content to reflect the two additional channels each broadcaster currently operates that do not attract any quotas.
        iii. The broadcasters should be able to count Australian content shown on their digital multichannels towards meeting the expanded sub-quota obligations.
        iv. The existing 80 per cent quota for Australian-produced advertising on each broadcaster's primary channel should be maintained.
    b. For subscription television providers:
        i. The 10 per cent minimum expenditure requirement on eligible drama channels should be maintained.
        ii. ii. A 10 per cent minimum expenditure requirement should be placed on children's and documentary channels.

Chapter 6: Australian content: radio

19. Australian music quotas should continue to apply to analog commercial radio services offered by content service enterprises and be extended to digital-only radio services offered by content service enterprises.
20. Music quotas should not be applied to occasional or temporary digital radio services.
21. Given the evolving state of internet-based music services, quotas should not be applied at this time.

Chapter 7: Local content: television and radio

22. Commercial free-to-air television and radio broadcasters using spectrum should continue to devote a specified amount of programming to material of local significance.

23. A more flexible compliance and reporting regime for television and radio should be implemented for the obligations set out in recommendation 22.

24. The current radio 'trigger event' rules should be removed.

Chapter 8: Public and community broadcasting

25. The charters of the ABC and the SBS should be updated to expressly reflect the range of existing services, including online activities.

26. While Australian content quota obligations continue for commercial free-to-air television broadcasters as a transitional measure, quotas should also apply to the public broadcasters.

    a. The primary ABC channel should have a 55 per cent Australian content quota consistent with the obligation on commercial free-to-air television broadcasters.

    b. Reflecting its multicultural charter obligations, the SBS should be required to target half this amount (22.5 per cent).

Chapter 9: Spectrum allocation and management

27. There should be a common approach to the planning, allocation and management of both broadcasting and non-broadcasting spectrum that includes:

    a. a market-based pricing approach for the use of spectrum, and one that provides greater transparency when spectrum may be used for public policy reasons

    b. spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the Broadcasting Services Act 1992

    c. ministerial powers to reserve and allocate spectrum to achieve policy objectives considered important by the government and the Australian community, including public and community broadcasting, which have contributed to the diversity of the Australian broadcasting system

    d. certainty for spectrum licence holders about licence renewal processes.

28. Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:

    a. as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcasting use

    b. commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.

29. The new communications regulator should allocate channel capacity on the sixth planned television multiplex (known as the 'sixth channel') to new and innovative services that will increase diversity. The use of capacity on the sixth multiplex for the distribution of community television services should continue. Existing commercial free-to-air television broadcasters and the ABC and the SBS should be precluded from obtaining capacity on the sixth multiplex.

Chapter 10: Implementing the new approach

30. The Review's recommendations should be implemented in three distinct stages:

a. Stage 1: Stand-alone changes that can be achieved in the short term should be made to policies, programs and legislation, including the public interest test that will apply to changes in control of content service enterprises.

b. Stage 2: New content services legislation should replace the Broadcasting Services Act 1992 and existing classification legislation.

c. Stage 3: The reform of communications legislation should be completed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.

31. The new communications regulator should be established in time to implement the new regulatory arrangements recommended for stage 1, and assume the remaining functions of the Australian Communications and Media Authority at the conclusion of stage 2 of the implementation process outlined in recommendation 30.

B. Relevant Findings

The relationship of the findings of the Review to the requests of AFACT are summarised in the table below. Of note:

The focus on the importance of preserving rules relating to legal content was emphasised by AFACT over the course of 4 submissions to the Review. The Review did not address this topic in a comprehensive manner, but it was touched on in the following ways:

- It was announced in February that the ALRC will be conducting a review into the operation of copyright in the digital environment, and that this review will address concerns surrounding re-transmission as was the issue in the recent Optus TV Now case. This review may address AFACT's concerns regarding the relationship between convergence and legal content.
- The phrase 'illegal content' is used in a few places in the report, reinforcing that such regulation of such content should apply equally and consistently across mediums. The phrase is ambiguous however and it is arguable that the word as utilised in the report refers to offensive rather than rights infringing content.

The focus on the importance of the freedom of parties to reach agreements protecting intellectual property as needed was also addressed in the following ways:

Request	**Outcome**
The draft Terms of Reference for the Convergence review should expressly acknowledge and deal with: a) The domestic and international intellectual property regulatory framework; b) The trade/treaty framework such as the AUS-US FTA; and c) The legitimate rights and expectations of providers in the content supply value chain (**IPR elements**).	Not expressly addressed. NB p. 33 mentions the ALRC review into the operation of copyright in the digital environment announced in Feb 2012. Also the Convergence Review (**Review**) proposes that copyright issues arising be referred to the relevant minister for consideration by the government.
Any review of the production and delivery of media content must consider the content supply value chain and providers as well as consumers	Providers of media content are considered in the Report, specifically Australian content producers and distributors. Benefits for producers of

of media content.	Australian content and responsibilities of distributors contained in Recommendations 13-16: 13. The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in Recommendations 14 and 15. 14. Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund. 15. The government should create and partly fund a new converged content production fund to support the production of Australian content. 16. Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.
The relevant laws protecting intellectual property rights should be specified in the Regulatory Objects.	Not addressed.
The Convergence Review must balance the best interests of the Australian public (which implies consumers) with the legitimate interests of providers and owners of content.	Very broad request, arguably achieved from perspective of Australian content.
A policy and legislative framework that protects the Australian production sector and its dependence on revenue received from content distribution is of relevance to the Convergence Review.	Some discussion in the Report of re-transmission and anti-siphoning on pages 33-35. The Australian production sector is protected through Recommendations 13-16: see above.
At least one individual appointed to the Committee of Independent Experts should possess expertise in the area of the IPR elements.	Not addressed.

Request	Outcome
Recognition of the existing intellectual property framework and Australia's international obligations as an explicit and stand-alone principle as part of any new regulatory framework.	Not addressed.
Reference (from Principles 3, 4 and 6) to access by Australians to various forms of content should be qualified to state legitimate content that does not infringe intellectual property rights or encourage piracy.	There is a general statement regarding a policy objective of preventing access to illegal content on p. 37 of the Report, with respect to content standards. (There are other general statements throughout the report with respect to illegal content but in context they refer to offensive content rather than content infringing intellectual property rights.)
Any new regulatory environment should explicitly state that the content referred to is legitimate content that does not infringe intellectual property rights or encourage piracy.	Not addressed.
Principle 5 regarding communications and media services reflecting community standards should be qualified to refer to legally responsible community standards and expectations.	Not addressed.
An agnostic regulatory framework as per Principle 2.	Recommendation 1 describes a general technology neutral approach to be taken by the policy framework.
Content should only be used on the terms and to the extent licensed by the owners of that content irrespective of the platform.	Recommendation 10 describes a technology neutral approach to media content standards.

Request	Outcome
Express recognition of the existing intellectual property framework and Australia's international obligations in any new regulatory framework, which could be included in the statement of objects or policy in the legislation.	Not addressed.
Industry players such as content distributors and producers to have the ability to freely negotiate licenses and carriage requirements on mutually agreed terms.	The opposite has been recommended: Recommendation 8 gives the new regulator power to instigate and conduct market investigations where there are potential content competition issues, and Recommendation 9 gives the new regulator flexible rule-making powers to promote fair and effective competition.
Access and participation with user generated content and social media should be consistent with the existing regulatory regime in relation to intellectual property rights.	The opposite has been recommended: enterprises controlling user-generated content, non-professional content, have been excluded from the definition of content service enterprises in Recommendation 4. Some hosts of user-generated content can be content service providers however, see page 11.
Any statement regarding access to content should be qualified to read access to legitimate content that does not infringe intellectual property rights or encourage content theft.	Not addressed.
Education of the public on acceptable digital technology and online practices.	Recommendation 12 suggests general education on media and digital literacy.
Express recognition of the interests of the owners of intellectual property rights.	Not addressed.
Adoption of the principle of regulatory parity as discussed in the Emerging Issues Paper and Layering, Licensing and Regulation Discussion Paper allowing content owners the ability to licence their content to different platforms based on mutually agreed terms.	Regulatory parity applies equally among content service enterprises described in Recommendations 3-4. The ability to licence content to different platforms not allowed when anti-competitive: see Recommendations 8-9.
A platform agnostic, technologically neutral regulatory framework.	Recommendation 1 describes a general technology neutral approach to be taken by the policy framework.

Request	Outcome
A statement of commitment to preventing illegal content and intellectual property infringement, possibly through a statement of objects or policy in the legislation.	Not addressed.
Clear regulatory enforcement mechanisms.	These are recommended for content in Recommendation 11.
Content standards that emphasise the existing framework of intellectual property laws including Australia's international obligations, and include measures to address illegal content in the online environment.	Not addressed with the exception of the general statement regarding a policy objective of preventing access to illegal content on p. 37 of the Report, with respect to content standards.
Non regulatory compliance options to strengthen content standards such as consumer education and outreach and industry incentives.	Education is addressed in Recommendation 12 in the form of general education on media and digital literacy.
A clear and unambiguous definition of a Content Service Enterprise, in particular taking into account exemptions for smaller businesses, motives for classification (should not be solely for the purpose of imposing additional regulation) and registration legitimising enterprises providing access to illegal content.	Broad definition of a content service enterprise in Recommendation 4 – the Report gives estimated figures of threshold Australian sourced content revenue of $50 million a year and users of 500,000 per month, both which exclude smaller businesses. Other concerns not specifically addressed.
Any content expenditure requirement for a Content Service Enterprise should be fair and contain a right for the Content Service Enterprise to elect the way in which it makes it's spend.	A percentage of total revenue of content services enterprises is required to be invested in production of Australian drama, documentary or children's content, or where this not practicable contributions made to a new converged production fund as per Recommendation 14.

Request	Outcome
The *Classification of Media Content Act* should provide that feature films and television programs produced on a commercial basis be classified before they are sold or otherwise made available (proposal 6-1).	Specifically addressed page 44.
The benchmark classification should be made at the first release window regardless of the release platform.	Not addressed.
Where theatrical distribution follows another type of release platform the responsibility must lie with the distributor as to whether the film should be reclassified.	Not addressed.
Reclassification should only occur when modifications have been made that may alter the classification of the film (proposal 6-7), and this should be ensured through the insertion in the *Classification of Media Content Act* of a definition of 'modify' as: modifying content such that the modified content is likely to have a different classification from the original content.	Not addressed.
The Industry Code should include examples of modifications of different programs to provide practical guidance on the interpretation of 'modify'.	Not addressed.
The *Classification of Media Content Act* give the Classification Board the power to review its own classification decisions as well as industry classifier decisions (proposal 7-6).	Specifically addressed page 119.
The *Classification of Media Content Act* stipulate that the majority of the assessors on any review panel must not have been involved in the classification decision being appealed.	Not addressed.
The *Classification of Media Content Act* prescribe that distributors have the opportunity to present their case for a new classification decision in person to the review panel.	Not addressed.
The Regulator have powers under the *Classification of Media Content Act* to ensure Industry Classifiers meet appropriate standards (proposal 7-7). To this end, the sanctions regime directed at Industry Classifiers should include graduated response mechanisms starting with educational notices and escalating to warnings and sanctions such as suspension of the self-assessor's ability to make authorisations for a certain time period.	Specifically addressed in Recommendation 11.
A revised set of classification categories under the National Classification Scheme applicable across all platforms (proposal 9-1).	Specifically addressed page 42, 44.
The proposed Teen 13+ classification be changed	Not addressed.

to PG 12+.	
The current MA 15+ classification be changed to M 15+ with the M standing for ‘Mature’.	Not addressed.